SECTION 1983 IS BORN:

THE SUPREME COURT STORIES OF *TENNEY v. BRANDHOVE* AND *MONROE v. PAPE*

By Sheldon Nahmod (1-29-13)*

Introduction

Section 1983 famously provides a damages remedy against state and local government officials and local governments for violations of constitutional rights.[1] Frequently used by litigants to promote constitutional accountability, it generates considerable litigation in the federal courts.[2] It has also been,

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[1] The text of section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable*. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (emphasis added to show effect of section 309 of the Federal Courts Improvement Act of 1996).

I have written a three-volume treatise on section 1983. Sheldon Nahmod, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 2012)[hereafter, Nahmod, CIVIL RIGHTS AND LIBERTIES].

[2] For the twelve-month period ending September 30, 2011, 37,020 federal civil rights actions were filed in the federal courts (out of 289,252 actions in total for that period). Of those, 15,141 were employment cases, most of which probably were Title VII actions, although they could also have included section 1983 actions. 16,395 other cases, under the heading "Other Civil Rights," were also filed in the federal courts. Most of these probably were section 1983 actions. Other kinds of federal civil rights actions filed, far fewer in number, involved voting, housing, welfare and the Americans With Disabilities Act.

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and continues to be, a vehicle for the articulation of much constitutional law.[3] Though section 1983 was enacted in 1871 by the 42nd Congress, it was largely dormant for many decades because of restrictive interpretations of state action and the Fourteenth Amendment.[4]

It was only in 1951, when the seminal decision in *Tenney v. Brandhove*[5] was handed down, that the Supreme Court for the first time expressly interpreted the language of section 1983.[6] *Tenney*, a First

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See http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C02Sep11.pdf (visited 12-11-12)

[3] E.g., the Eighth Amendment in Farmer v. Brennan, 511 U.S. 825 (1994); substantive due process in DeShaney v. Winnebago County, 489 U.S. 189 (1989); procedural due process in Paul v. Davis, 424 U.S. 693 (1976); and equal protection in Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591 (2008).

[4] Motivated primarily by federalism concerns, the Supreme Court narrowly interpreted the state action requirement of the Fourteenth Amendment in the Civil Rights Cases, 109 U.S. 3 (1883). However, post-World War II cases involving racial discrimination in voting and housing discrimination reflected a major shift. "*Smith*, *Shelley*, and *Terry v. Adams* (1953) suggested that the justices were no longer willing to permit state-action doctrine to obstruct the pursuit of racial equality." Michael J. Klarman, FROM JIM CROW TO CIVIL RIGHTS (2004) 279 (footnote omitted) [hereafter Klarman, FROM JIM CROW TO CIVIL RIGHTS]:

Similarly, the Court earlier had narrowly interpreted the Fourteenth Amendment's privileges or Immunities clause in the Slaughter-House Cases, 83 U.S. 36 (1873).

By 1937 the Supreme Court had incorporated rights under the First Amendment and the right to compensation for property taken by the state. Still, in 1947 the Court, over the dissents of Justices Black and Douglas, had refused to incorporate the Fifth Amendment's self-incrimination clause in Adamson v. California, 332 U.S. 46 (1947). It was only in Wolf v. Colorado, 338 U.S. 25 (1949), that the Court incorporated the Fourth Amendment, and in Mapp v. Ohio, 367 U.S. 643 (1961), that the Fourth Amendment's exclusionary rule was similarly incorporated. See generally Duncan v. Louisiana, 391 U.S. 145 (1968), which incorporated the Sixth Amendment right to jury trial and listed as also incorporated, by then, the Fifth Amendment right to be free from self-incrimination and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation and to compulsory process. The Eighth Amendment's prohibition against cruel and unusual punishment was incorporated in Robinson v. California, 370 U.S. 660 (1962).

[5] Tenney v. Brandhove, 341 U.S. 367 (1951).

[6] Hague v. CIO, 307 U.S. 496 (1939), an important First Amendment public forum case, was brought under section 1983. But *Hague* dealt with constitutional interpretation and not statutory interpretation. On the other hand, the Court's decisions involving the color of law requirement of 18 U.S.C. sec. 242, the criminal counterpart of section 1983, were directly relevant to interpreting section 1983, as will be seen *infra*. These cases include U.S. v. Classic,

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Amendment legislative immunity case arising in a Cold-War and domestic Communist subversion setting, pitted two influential Supreme Court justices, Felix Frankfurter and William Douglas, against one another in majority and dissenting opinions, respectively. Justice Frankfurter, a former Harvard Law School professor and outspoken civil rights and liberties proponent appointed to the Court by President Roosevelt, had become an unremitting advocate of federalism, deference to politically accountable bodies and judicial restraint,[7] as reflected in his majority opinion in *Tenney*. In contrast, Justice Douglas, a former Columbia Law School and Yale Law School professor, a former chairman of the Securities and Exchange Commission, and similarly an appointee of President Roosevelt, was an ardent proponent of individual rights who had relatively little concern for federalism[8] and was the sole dissenter in *Tenney*,

Ten years later, in 1961, the Court handed down another seminal section 1983 decision in *Monroe v. Pape*,[9] a case brought by an African-American involving alleged police misconduct. *Monroe*, arising in the post-*Brown v. Board of Education*[10] period when concern with domestic Communist subversion was still present but diminished, dealt with the section 1983 cause of action itself, the Fourteenth Amendment and with local government liability. In *Monroe,* the second Supreme Court decision interpreting section 1983, these two justices were again on opposite sides. But this time it was

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313 U.S. 299 (1941), Screws v. U.S. 325 U.S. 91 (1945) and U.S. v. Williams, 341 U.S. 97 (1951). See, on *Classic*, David M. Bixby, The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at *United States v. Classic*, 90 Yale L. J. 741 (1981).

[7] See generally Noah Feldman, SCORPIONS (2010); Melvin Urofsky, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES (1991); Felix Frankfurter, OF LIFE AND LAW AND OTHER THINGS THAT MATTER: PAPERS AND ADDDRESSES OF FELIX FRANKFURTER, 1956-1963 (Philip B. Kurland, ed. 1965).

[8] See, e.g., Perez v. United States, 402 U.S. 146 (1971), dealing with the commerce clause, and Griswold v. Connecticut, 381 U.S. 479 (1965), dealing with the right of privacy. Justice Douglas was actively involved in the New Deal. See generally Noah Feldman, SCORPIONS (2010); William O. Douglas, THE COURT YEARS (1980); William O. Douglas, GO EAST YOUNG MAN: THE EARLY YEARS (1974).

[9] Monroe v. Pape, 365 U.S. 167 (1961).

[10] Brown v. Board of Education, 347 U.S. 483 (1954), striking down public school segregation as violative of equal protection.

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Justice Douglas who wrote the majority opinion. His opinion emphasized individual rights, rejected the defendants' federalism contentions, expansively interpreted section 1983 and ruled for the plaintiff against police officers. In contrast, Justice Frankfurter wrote an extensive, and aggressive, partial dissent on the color of law issue emphasizing federalism.[11]

I want to tell of the birth of section 1983 jurisprudence through the stories of these two cases. These stories are contained in the papers of Justices Frankfurter and Douglas and in their majority and dissenting opinions in *Tenney* and *Monroe*.[12] They are also contained in the parties' petitions for certiorari and briefs in *Tenney* and *Monroe*, and in *Monroe*'s oral argument. Finally, these stories can only be understood against the background of the political and social settings in which *Tenney* and *Monroe* arose.

I believe these stories are of interest both to section 1983 scholars and to historians of civil rights and constitutional law. Justice Frankfurter, as an advocate of federalism, played an outsized role in both decisions. He wrote the majority opinion in *Tenney* that established the template for the Court's

[11] In 1951, when *Tenney* was handed down, the Court consisted of the following: Chief Justice Vinson and Justices Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton. The composition of the Court had changed dramatically between 1935 and 1940, when President Roosevelt appointed five justices, in this order: Black, Reed, Frankfurter, Douglas and Murphy.

In 1961, when *Monroe* was handed down, the Court's composition had changed. It consisted of Chief Justice Warren and Justices Black, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart and Frankfurter. Chief Justice Vinson and Justices Reed, Jackson, Burton and Minton were no longer on the Court. They had been replaced by Warren (for Vinson), Harlan (for Jackson), Brennan (for Minton), Whittaker (for Reed) and Stewart (for Burton). Among those four remaining from 1951, Justices Frankfurter and Douglas were still major players, albeit on opposite sides of the judicial philosophy spectrum. Justice Brennan would emerge later as a liberal champion of individual rights. See Seth Stern and Sephen Wermiel, JUSTICE BRENNAN: LIBERAL CHAMPION (2010).

[12] The disagreements between these two justices were, of course, not limited to these two section 1983 cases. See Melvin Urofsky, Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities on Philosophies on the United States Supreme Court, 1988 Duke L. J. 71.

current approach to individual immunities.[13] And while he dissented alone on *Monroe*'s color of law issue, he also almost single-handedly persuaded the Court to rule unanimously that local governments were not suable persons.[14] This ruling lasted seventeen years, until overruled by *Monell v. Department of Social Services*[15] in 1978.

These cases also demonstrate that the early and deep tension between individual rights and federalism--a tension that began with the Fourteenth Amendment[16] and continues to this day[17]--was present at the very beginning of the development of the Supreme Court's section 1983 jurisprudence. The certiorari petitions and briefs in these cases, the oral argument in *Monroe* and the Court's opinions articulate this tension.

Moreover, the different political and social contexts in which *Tenney* and *Monroe* were decided illuminate the decisions themselves. The Cold War and anti-Communist sentiment situate *Tenney* while the Civil Rights movement and the post-Brown era situate *Monroe*.

Even though *Tenney* and *Monroe* are significant because they established the foundations of individual immunity doctrine and the elements of the section 1983 claim, I do not focus on section 1983

[13] See discussion *infra*.

[14] See discussion *infra*.

[15] Monell v. Department of Social Services, 436 U.S. 658 (1978).

[16] See, e.g., The Slaughter-House Cases, 83 U.S. 36 (1873), severely limiting the scope of the Fourteenth Amendment's privileges or immunities clause, and The Civil Rights Cases, 109 U.S. 3 (1883), limiting Congressional power under section 5 of the Fourteenth Amendment to protect individual rights through a restrictive interpretation of the state action requirement. These and similar decisions of the period were grounded in large measure on federalism concerns.

[17] See, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997), limiting Congressional power under section 5 of the Fourteenth Amendment to protect individual rights generally; Board of Trustees v. Garrett, 531 U.S. 356 (2001), limiting Congressional power under section 5 of the Fourteenth Amendment to protect individual rights through damages actions against states because of the Eleventh Amendment

doctrine in this Article.[18] My focus is, instead, on the stories of *Tenney* and *Monroe* in the Supreme Court.

I. *Tenny v. Brandhove*

A. *Tenney:* The Political and Social Setting

Tenney arrived at the Court in 1950 when Harry Truman was President and as the Cold War between the United States and the Soviet Union was heating up. Both countries were allies during the Second World War but in the immediate post-war years an "Iron Curtain" (to use the famous metaphor of Winston Churchill) [19] had descended over Europe. The Soviet Union exacerbated the relationship further by using spies against the United States to steal the science of the atomic bomb, leading to the Soviet Union's testing of an atomic bomb in 1949.[20] As a result of these and other factors, including the Korean War that began in 1950, anti-Communism sentiment began to pervade American politics and society generally. At the national level this was exemplified by the activities of the House Committee on Un-American Activities[21] and the growth of McCarthyism, a particularly strident form of political anti-

[18] On doctrinal aspects of section 1983, see generally Nahmod, CIVIL RIGHTS AND LIBERTIES.

[19] Churchill's speech was delivered on March 4, 1946, at Westminster College in Fulton, Missouri.

See also MARY DUDZIAK, COLD WAR AND CIVIL RIGHTS 11 (2000)[hereafter, Dudziak, COLD WAR AND CIVIL RIGHTS]:

"By 1947, the Cold War came to dominate the American political scene. As the Truman administration cast Cold War international politics in apocalyptic terms, 'McCarthyism' took hold in domestic politics. If communism was such a serious threat world-wide, the existence of communists within the United States seemed particularly frightening. As the nation closed ranks, critics of American society often found themselves labeled as 'subversive'."

[20] Klarman, FROM JIM CROW TO CIVIL RIGHTS 183: "Especially after the Soviets detonated an atomic bomb in 1949, and nuclear espionage by Klaus Fuchs and the Rosenbergs was publicly revealed, Americans became obsessed with the Cold War."

[21] "In 1945 the House Un-American Activities Committee was created as a permanent standing committee to replace the temporary Select Committee on Un-American Activities (the Dies Committee) that had existed since 1938. The committee was commonly known by its acronym HUAC until 1969, when its name was changed to the

Communism.[22] Moreover, legislative committees were created at all governmental levels to inquire into the "infiltration" of Communists in the military and in labor unions and among actors, musicians and academics.[23] Also proliferating were loyalty programs, registration requirements for so-called Communist-front groups[24] and attempts to outlaw the Communist Party.

The Cold War and anti-Communism were reflected in the Supreme Court's 1950 Term in a host of important decisions in addition to *Tenney*. The most famous of these, *Dennis v. United States,*[25] upheld the conspiracy convictions of leaders of the Communist Party under the 1940 Smith Act[26] in the face of a powerful First Amendment challenge. *Garner v. Los Angeles*[27] upheld a loyalty oath for public employment while *Gerende v. Board of Elections*[28] upheld a loyalty oath for candidates for local

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Committee on Internal Security. In 1975 the committee was abolished and its jurisdiction transferred to the Judiciary Committee." http://www.archives.gov/legislative/guide/house/chapter-14-judiciary.html#HUAC (visited 12-19-12).

[22] On February 9, 1950, Senator Joseph McCarthy of Wisconsin announced that he had the names of 57 individuals working in the State Department who were "either card-carrying members or certainly loyal to the Communist party." McCARTHY INSISTS TRUMAN OUSTS REDS, N.Y. Times, p. 5, February 12, 1950. However, in a hearing before the Senate Committee on Foreign Relations, he declined to provide the names of any "card-carrying Communists" working for the federal government. M'CARTHY ACCUSED OF TWISTING FACTS; SENATE IN TURMOIL, N.Y. Times, p. 1, May 4, 1950.

Previously, Congress in 1947 enacted the National Security Act that established the National Security Council and Central Intelligence Agency. 50 U.S.C. sec 402. Also in 1947, President Truman created a loyalty program for federal employees through Executive Order 9835. <http://www.archives.gov/federal-register/executive-orders/1947.html> (visited 12-20-12).

[23] For example, section 9(h) of the Labor Management Relations Act of 1947 (Taft-Hartley), 29 U.S.C. sec. 185, required labor union officers, as a condition for enforcement of employee representation rights, to execute affidavits that they were not members of the Communist Party.

[24] For example, the Internal Security Act of 1950, noted above.

[25] Dennis v. United States, 341 U.S. 494 (1951).

[26] 18 U.S.C. sec. 2385.

[27] Garner v. Los Angeles, 341 U.S. 716 (1951).

[28] Gerende v. Board of Elections, 341 U.S. 56 (1951).

elections. *P. Blau v. United States*[29] limited the scope of federal investigations of persons and organizations suspected of subversive activity, and *Rogers v. United States*[30] dismissed an assertion of the privilege of self-incrimination by a local treasurer of the Communist Party.[31]

It was in this Cold War and anti-Communism setting that *Tenney* arose.

B. *Tenney:* The Petition for Certiorari

In 1949, William Brandhove, the plaintiff in *Tenney* and an admitted Communist, sued members of the California Senate's Fact-Finding Committee on Un-American Activities," the so-called "Tenney Committee," under section 1983 for $250,000 in connection with his having been summoned as a witness at a hearing on un-American activities. The plaintiff alleged that the hearing was conducted without a legitimate legislative purpose but rather to intimidate and deter him in violation of his First and Fourteenth Amendment rights. The district court dismissed for failure to state a claim but the Ninth Circuit reversed[32] even while expressing doubt that the plaintiff would ultimately prevail on the merits. It held that the plaintiff could inquire into whether the members of the Tenney Committee had an impermissible purpose, and thus abused their powers, in conducting the hearing in violation of plaintiff's First and Fourteenth Amendment rights.

[29] P. Blau v. United States, 340 U.S. 159 (1950).

[30] Rogers v. United States, 341 U.S. 367 (1951).

[31] Not all of the Court's important free speech-related cases in the 1950 Term revolved around subversive activities. Thus, the Court also handed down Feiner v. New York, 340 U.S. 315 (1951), dealing with the "hostile audience"; Niemotko v. Maryland, 340 U.S. 268 (1951), and Kunz v. New York, 340 U.S. 290 (1951), both considering permit requirements for speaking in public places such as parks and streets; and Breard v. Alexandria, 341 U.S. 622 (1951), dealing with door-to-door canvassing without the prior consent of homeowners.

[32] Brandhove v. Tenney, 183 F.2d 121 (9th Cir. 1950).

The defendant legislators identified three major questions as presented in their Petition for Certiorari.[33] They first asked whether the federal judiciary should inquire into the motives of state legislators when legislators act within their official duties. Characterizing the case as one of first impression, they suggested that it raised separation of powers concerns regarding judicial inquiries into legislative motives. They expressed particular concern with having to defend based on mere allegations of malice.[34] Second, they contended that section 1983 was not intended to cover such situations and that state legislators were "exempt" from section 1983 liability. Finally, they argued on the constitutional merits that the plaintiff's reliance on the First Amendment's Petition Clause was misplaced: it did not cover the right to petition *state* legislators and it was not incorporated by the Fourteenth Amendment. Moreover, they observed that these important issues had not even been discussed by the Ninth Circuit.

Concluding, the defendants argued that the Court should grant certiorari because there was a conflict between the Ninth Circuit decision and decisions of the Court regarding the propriety of judicial inquiries into legislative motives. Also, there was an inter-circuit conflict on that issue as well as on the related issue of legislative immunity under section 1983.

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[33] The Petition for Certiorari at p. 9 describes the basic question as follows: "Does the complaint in the present action state a cause of relief [sic] under the Civil Rights Act?" The Petition then goes on at pp. 9-10 to raise the following questions: "(a) Does the judiciary have the power to inquire into the motives of the legislative branch of a State Government? (b) Does the Constitution of the United States secure to the respondent a right to petition the Legislature of the State of California? (c) Is [sic] the State Legislature of the State of California and its members liable in damages under the provisions of Sections 43 [section 1983] and 47(3)[section 1985(3)] of Title 8 U.S.C.A. when acting in discharge of their duties as state legislators?"

Harold C. Faulkner and Wilbur F. Mathewson of San Francisco, together with Fred Howser, California Attorney General and several other attorneys, were on the Petition for Certioriari. They were also on the merits brief. They had represented the defendants in the Ninth Circuit.

[34] This kind of argument, grounded on over-deterrence concerns, still resonates in the Court's absolute and qualified immunity decisions. See Nahmod, CIVIL RIGHTS AND LIBERTIES chs. 7, 8.

The plaintiff, rather than suggesting that the issues raised were unimportant or unworthy of granting certiorari,[35] contended that state law could not vest any person with immunity to violate federal rights.[36] Further, he maintained that color of law includes misuse of power, as declared by *United States v. Classic*.[37] In this connection, he argued that federal courts have the power to determine whether a state legislative committee or its members violated a person's constitutional rights. This was not an impermissible inquiry into motive but rather a permissible inquiry into intent and purpose. The plaintiff essentially argued that the Ninth Circuit's decision was correct, including on the constitutional merits.

C. *Tenney:* Certiorari Granted; Merits Briefs

Justice Douglas's law clerk, Hans A. Linde,[38] submitted an internal memo noting that, on the merits, the plaintiff had a hard case to prove. Also, this case involved only pleadings that had been given a liberal interpretation. Linde also observed, without elaboration, that even if the plaintiff were to

[35] The plaintiff's Brief in Opposition states at p. 2 that the sole Question Presented is "whether Respondent's complaint states a claim for relief under the Civil Rights Statutes (8 U.S.C., sections 43, 47(3))" and then goes on to list various "subordinate questions" that include questions similar to those in the Petition.

George Olshausen, Martin J. Jarvis, Elmer P. Delaney and Richard O. Graw, all of San Francisco, were on the brief opposing certiorari. They were also on the merits brief. Jarvis, Delaney and Graw, who had represented the plaintiff in the Ninth Circuit, apparently practiced together. See Estate of Kearns, 36 Cal.2d 531 (1950).

[36] This was an argument that the defendants did not appear to make.

[37] United States v. Classic, 313 U.S. 291 (1941). The plaintiff's argument in *Tenney* anticipated a major issue that was resolved ten years later in *Monroe* in favor of the following position, as espoused in *Classic*: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law." 313 U.S. at 308-9. This position was reaffirmed, over three dissents, including that of Justice Frankfurter, in Screws v. United States, 325 U.S. 91 (1945). See discussion *infra* at --.

[38] Linde was a professor at Oregon Law School from 1959 to 1976, and then a Justice of the Oregon Supreme Court from 1977 to 1990. He is Jurist in Residence at Willamette Law School. The Association of American Law Schools (AALS) Directory of Law Teachers, 2011-2012.

prevail, "serious issues" would be raised. He accordingly recommended denying certiorari.[39] However, the Court granted certiorari on December 11, 1950.

This was not surprising: the Ninth Circuit's decision in *Tenney*, if left standing, had the potential to hamper, if not undermine altogether, state legislative investigations into domestic Communism and Communist subversion. In addition, as the defendants pointed out in their Petition, to the extent that federal courts could inquire into legislative motivation, separation of powers concerns were directly implicated. This would threaten long-standing Congressional investigations into Communist subversion.

The parties and several amici thereafter submitted their merits briefs on the Questions Presented.

1. *Tenney*: The Defendants' Merits Brief.

At the outset, the defendants' merits brief argued that the Petition Clause, unlike the Free Speech Clause, was not incorporated by the Fourteenth Amendment and thus did not apply to state legislatures but only to Congress.[40] Next, the defendants maintained that when the United States government was formed, the absolute immunity of legislators was well established, with no distinction between state and federal legislators.[41] They also contended that legislators should not have to fear that money could be taken away from them for exercising their legislative duties: this was the "opposite" of bribery and, like bribery, should be prohibited. Further, separation of powers concerns supported the position that it was improper for the judiciary to inquire into the motives of legislators acting in the performance of their legislative duties. The remedy for claimed legislative abuses should be political, not

[39] Library of Congress [hereafter "LOC"], Douglas Box 207-No. 338.

[40] Defendant's Brief at p. 25.

[41] Id. at pp. 34-55.

a damages action. The defendants reminded the Court that it had never inquired into legislative motivation when considering the constitutionality of state laws and regulations, and the same principle should apply in this case.

Finally,[42] the defendants observed that the "purpose of the investigation of un-American activities of necessity involves freedom of the press, freedom of speech, freedom of assembly."[43] Since that was true of this very case, under the Ninth Circuit's decision members of every legislative committee investigating such activities could be subject to damages claims under sections 1983 and 1985(3). The defendants maintained that this would be intolerable given the importance of fighting Communism.

2. *Tenney*: The Plaintiff's Merits Brief.

In response, the plaintiff's merits brief focused overwhelmingly on the question of whether his complaint stated a claim for relief under section 1983.[44] The plaintiff first addressed the color of law question, arguing that abuses of state power were covered by section 1983. The plaintiff next discussed the Petition Clause and Free Speech Clause claims as well as the Fourteenth Amendment claims. Surprisingly, however, the plaintiff's brief spent only four and one-half pages on immunity and the impropriety of judicial inquiries into legislative motivation.[45]

[42] The final argument of the defendants at pp. 56-61 of their brief was that, as a matter of statutory interpretation, section 1983 did not apply to reprisals for exercising a constitutional right since other provisions of Title 8 covered reprisals.

[43] Plaintiff's Brief at p. 53.

[44] Id. at pp. 17-54. There was also a claim based on 42 U.S.C. section 1985(3), which makes actionable certain conspiracies directed at the exercise of constitutional rights. Id. at p. 55.

[45] Id. at pp. 56-60. The defendants' merits brief devoted considerable attention to these issues.

Plaintiff maintained in these few pages that the major section 1983 issue here was not legislative motivation "but … whether or not [defendants] acted with the intent and for the purpose of silencing a political opponent by abuse of State power."[46] Federal courts had the authority to inquire into "intent, deliberate planning and malice."[47] Furthermore, separation of powers concerns did not apply here because *federal* legislators were not involved: the issue was the abuse of state power "in collision with federal rights."[48] Beyond these points, there was no real response to defendants' argument that legislative immunity was well-established at the founding (and, by implication, in 1871) and should therefore be applicable to section 1983 claims as a matter of statutory interpretation and policy.

3. *Tenney*: Amicus Briefs.

In contrast to the plaintiff's merits brief, the amicus brief submitted in support of the defendants by the Attorney General of North Carolina[49] mentioned statutory interpretation and the legislative immunity issue. The North Carolina amicus brief,[50] explicitly raising federalism concerns, observed that the Ninth Circuit's decision threatened the sovereignty of the states and went beyond Congressional intent in enacting section 1983: Congress did not intend that this statute be used to inquire into legislative motive contrary to the traditional doctrine of legislative immunity.[51] However, the North Carolina amicus brief was more interested in a different statutory interpretation issue: the "uncertainty" of due process interpretation in connection with potential section 1983 damages liability.

[46] Id. a p. 57.

[47] Id.

[48] Id.

[49] Harry McMullan.

[50] This amicus brief was joined by the attorneys' general of several other states.

[51] North Carolina Amicus Brief at p. 4.

The amicus brief contended that there should at least be a willfulness requirement imposed on section 1983 plaintiffs as a matter of statutory interpretation,[52] contrary to the decision in *Picking v. Pennsylvania R. Co.*,[53] just like the express statutory requirement of willfulness in the criminal counterpart of 18 U.S.C. sec. 242. According to the North Carolina amicus brief, this requirement would save the constitutionality of section 1983 by limiting it. [54]

A thoughtful amicus brief submitted by the Attorney General of Wisconsin[55] directly raised and addressed the Tenth Amendment and federalism issues, and it focused on statutory interpretation and legislative immunity much more than the North Carolina amicus brief did. The Wisconsin amicus brief declared: "[T]he people in adopting the Fourteenth Amendment never intended to authorize the federal government to interfere with the internal government of states or of their officers when acting under due form of law [sic]. It is our further argument that Congress in passing the civil rights act of 1871 in turn never intended to create a cause of action against state officers and in particular state legislators who are acting in due form of law [sic]."[56]

Emphasizing section 1983 interpretation, the Wisconsin amicus brief argued that state legislators should not be in constant fear of vexatious litigation brought by those who "subvert the orderly processes of government."[57] Such litigation would undermine federalism and the Tenth

[52] This argument would later be rejected in *Monroe*. See discussion *infra*.

[53] Picking v. Pennsylvania R. Co., 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776, which rejected such a requirement for section 1983 because there was no statutory language supporting it.

[54] North Carolina Amicus Brief at p. 16.

[55] Vernon W. Thomson, Wisconsin Attorney General, was on the amicus brief, joined by two assistant Attorneys General.

[56] Wisconsin Amicus Brief at p. 2.

[57] Id.

Amendment. The amicus brief also maintained that section 1983 should not be interpreted as imperiling the independence of the legislative branch from the judicial by allowing the judiciary to inquire into legislative motives in section 1983 damages actions against state legislators.[58]

More narrowly, both defendants' merits brief and the Wisconsin amicus brief directed the Court's attention to the statutory interpretation issue in *Tenney*: did Congress intend to subject state legislators to damages liability when they violated a person's Fourteenth Amendment rights? This question necessarily raised the additional question of what interpretive approach to take with regard to section 1983 in light of its broad "person" language of section 1983 and the almost total absence of legislative history on the matter.

These arguments of the plaintiff, the defendants and the amici directly raised the conflict between individual rights under the First Amendment and weighty federalism and separation of powers concerns. They also demonstrated the importance of *Tenney*'s Cold War and anti-Communist setting as exhibited by the Wisconsin amicus brief's last argument heading: "By His Oath of Allegiance to the Communist State, Brandhove Expatriated Himself and Is No Longer Entitled to Assert the Privileges and Immunities of America or the State of California."[59]

D. *Tenney*: The Conference of the Justices

After the oral argument, [60] the Justices met in conference on March 3, 1951, and, according to the conference notes of Justice Douglas,[61] at least six justices initially voted to reverse the Ninth Circuit.

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[58] The federalism concerns raised by the defendants and the amici, and largely ignored by the plaintiff, were to play an important role in Justice Frankfurter's reasoning in his opinion for the Court, just as they were later to play a similar role in his dissenting opinion in *Monroe* on the color of law issue. See discussion *infra*.

[59] Id. at p. 16.

[60] I have been unable to locate a transcript of the oral argument in *Tenney.* Before the mid-to-late 1950's, transcripts were not ordinarily provided by the Court. According to the official report of *Tenney*, though, we know

Chief Justice Vinson indicated that federal courts should not get into questions of legislative motive. Justice Reed thought that there was no cause of action stated and also that legislative immunity was applicable. So, too, did Justice Frankfurter. In addition, Justices Burton, Clark and Minton voted to reverse although Justice Douglas's notes do not report why.

Justice Black, on the other hand, observed that the section 1983 cause of action question was not easy to answer since it appeared to him that one purpose of section 1983 was to impose liability on judges, sheriffs, legislators and the like. Justice Jackson commented only that a state could not confer immunity from damages liability if there was a violation of the Fourteenth Amendment. Justice Douglas himself expressed the view that there was no legislative immunity when legislators proceeded in a manner unrelated to their legislative functions, a point subsequently elaborated in his dissent in *Tenney.*

E. *Tenney*: The Opinions

1. *Tenney*: Justice Frankfurter's Opinion for the Court

Justice Frankfurter, assigned by Chief Justice Vinson, wrote the opinion for the Court. Justice Black concurred and Justice Douglas dissented. Justice Frankfurter avoided the section 1983 cause of action question, including the First Amendment and other constitutional issues, and proceeded straight to legislative immunity. He ruled for the Court that the defendants were protected by absolute immunity because they acted in a traditional legislative capacity.[62] In so doing, he privileged federalism

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that Harold C. Faulkner argued for the defendants, and Martin J. Jarvis and Richard O. Graw argued for the plaintiff.

[61] LOC, Douglas Box 207-No. 338.

[62] This approach by Justice Frankfurter was an effective way to avoid deciding difficult constitutional issues in section 1983 cases in a manner consistent with judicial restraint: rule for defendants on individual immunity grounds. This avoidance approach became especially important in later qualified immunity cases where the development of clearly settled law and "order of battle" considerations were to emerge decades later. Compare Wilson v. Layne, 119 S. Ct. 1692 (1999), declaring that a court addressing a claim of qualified immunity *must* first

values over individual rights and at the same time ensured that section 1983 would not hamper state legislative investigations into Communism and subversive behavior.

His opinion traced what he called the "presuppositions of our political history" from the "Parliamentary struggles of the Sixteenth and Seventeenth Centuries" through the 1689 Bill of Rights, the Articles of Confederation and the Speech or Debate Clause of the Constitution.[63] This political history made clear that absolute legislative immunity was necessary for legislators so that they could "discharge [their] public trust with firmness and success … and that [they] should be protected from the resentment of every one, however powerful…."[64] Justice Frankfurter contended that the political principles of the Speech or Debate Clause were already "firmly established in the States" at the founding, and gave examples from several state constitutions. He also pointed out that forty-one of the forty-nine states had constitutional provision protecting legislative privilege.

In order to counter the obvious fact that section 1983 covers "every person" and that it apparently does not immunize anyone from damages liability, Justice Frankfurter made a significant interpretive move that would become the starting point in all subsequent individual immunity cases: he inquired into the common law background of 1871.[65] He asked: "Did Congress by the general language

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determine whether the plaintiff had alleged a constitutional deprivation before proceeding to the clearly settled law inquiry, with Pearson v. Callahan, 129 S. Ct. 808 (2009), ruling that such a procedure was not necessary in every case. See generally Nahmod, CIVIL RIGHTS AND LIBERTIES sec. 813.

[63] Art. I, sec. 6.

[64] Tenney v. Brandhove, 341 U.S. at 373 (quoting James Wilson, "an influential member of the Committee of Detail"). Along similar lines, Justice Frankfurter, citing Dilliard, Congressional Investigations: The Role of the Press, 18 U. of Chi. L. Rev. 585 (19--), stated: "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies."

[65] See Note, Doctrine of Official Immunity under Civil Rights Acts, 68 Harv. L. Rev. 1229 (1955), which points out that, after *Tenney* especially, federal courts began interpreting section 1983 immunity doctrines against the common law immunity background. The Note criticizes this aspect of *Tenney*'s reasoning because it suggests that common law immunities should apply to all civil rights actions.

of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Government here?"[66] His answer, at the end of the same paragraph: "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."[67]

From that point on, it was relatively easy for Justice Frankfurter to conclude that the defendants were acting "in the sphere of legitimate legislative activity" when they engaged in the challenged Tenney Committee hearing. This was not a case in which it was "obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. " Moreover, "the claim of an unworthy purpose does not destroy the privilege … which would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."[68] In an oft-quoted sentence that emphasized his concern with over-deterrence, Justice Frankfurter explained, "One must not expect uncommon courage even in legislators."[69] The primary remedy in such situations was political: "Self discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." [70]Consequently, the defendants were protected by legislative immunity.

2. *Tenney*: Justice Black's Concurring Opinion and Justice Douglas's Dissenting Opinion

[66] Tenney v. Brandhove, 341 U.S. at 376. He effectively answered this question in the way he formulated it.

[67] Id.

[68] Tenney v. Brandhove, 341 U.S. at 377.

[69] Id.

[70] Tenney v. Brandhove, 341 U.S. at 378.

Concurring, Justice Black agreed with Justice Frankfurter's reasoning, his reliance on tradition and the result. But he also observed: "[T]oday's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable under the Civil Rights Act."[71] He further made explicit an important distinction between legislative immunity and constitutionality: legislators who are found to be protected by absolute immunity may nevertheless have acted unconstitutionally and caused harm.[72]

Displaying obvious sensitivity to the Cold War and anti-Communist fervor,[73] Justice Black warned of the potential for legislative abuse of committee hearings. He mentioned by way of example the "use of a committee of the Argentine Congress to strangle the independent newspaper La Prensa because of the views it espoused."[74] He admonished: "Those who cherish freedom of the press here would do well to remember that this freedom cannot long survive the legislative snuffing out of freedom to believe and freedom to speak."[75]

Justice Douglas dissented.[76] Emphasizing the First Amendment's right of free speech which he, together with Justice Black, viewed as virtually absolute, Justice Douglas "could think of no reason" why the members of a state legislative committee should be immune when the committee "departs so far

[71] Tenney v. Brandhove, 341 U.S. at 379.

[72] This is a normative point that goes well beyond the scope of this Article. In effect, a successful defense of absolute immunity means that the injured plaintiff bears the loss in the public interest. See Nahmod, From the Courtroom to the Street: Court Orders and Section 1983, 29 Hast. Const. L. Q. 613 (2002).

[73] Both he and Justice Douglas strongly dissented in *Dennis,* decided in the same Term as *Tenney*, which upheld convictions under the Smith Act of the national leaders of the Communist Party.

[74] Tenney v. Brandhove, 341 U.S. at 380-81 (citing two articles in the New York Times in March, 1951).

[75] Tenney v. Brandhove, 341 U.S. at 381.

[76] Tenney v. Brandhove, 341 U.S. at 381.

from its domain to deprive a citizen of a right protected by the Constitution."[77] He was concerned that the Court's decision imposed no limits on state legislative committees. Clearly influenced by federal and state law enforcement moves against Communists and suspected subversives,[78] he asked rhetorically:

> May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? May they sit as a board of censors over industry, prepare their blacklists of citizens, and issue pronouncements as devastating as any bill of attainder?[79]

Justice Douglas contended that when a citizen claimed a state legislative committee acted against him for an "illegal or corrupt purpose, the reason for the immunity ends." There was "no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain."[80]

Justice Douglas did not directly engage Justice Frankfurter in a discussion of the language of section 1983, the history of legislative immunity and whether that history should affect the section 1983 statutory interpretation issue raised in *Tenney*. Perhaps this was because he was the sole dissenter.[81] For him, the staunch supporter of individual rights, the controlling issue was the availability of a section 1983 damages remedy for the alleged First Amendment violation. He was not concerned with the possibly adverse consequences on legislative investigations of subjecting state legislators to litigation and potential damages liability. Similarly, federalism was not a hurdle when it came to interpreting the plain "Every person" language of section 1983 in favor of the *Tenney* plaintiff.

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[77] Tenney v. Brandhove, 341 U.S. at 382.

[78] Again, recall *Dennis*.

[79] Id.

[80] Tenney v. Brandhove, 341 U.S. at 343.

[81] However, this did not prevent Justice Frankfurter from engaging at length on the merits in his partial (and sole) dissent in *Monroe*. See discussion *infra*.

3. The *Tenney* Doctrinal Template and Issues Avoided

As the first section 1983 decision, *Tenney*, established the doctrinal template for all subsequent section 1983 individual immunity cases.[82] The first inquiry to be made, according to *Tenney*, was into the common law immunity background in 1871. In *Tenney*, this historical inquiry led to the conclusion that at common law in 1871 legislators were protected by absolute immunity for their legislative conduct. The next inquiry was into whether that common law immunity background should govern section 1983 claims. In *Tenney*, the Court determined that if Congress had desired to depart from the common law, it would have said so explicitly. Moreover, with its concern for independent decision-making by state legislators and thus for federalism, *Tenney* asserted as a matter of policy that the availability and scope of individual immunity depended on the extent to which the particular defendants should bear the costs of being sued, not just the costs of liability.[83] And finally, *Tenney* indicated that legislative immunity protected only legislative acts, thus suggesting the functional approach to immunities that was also to develop later.[84]

In resolving the case on immunity grounds, *Tenney* was able to avoid First Amendment issues involving the scope of the Petition Clause as well as the question of incorporation by the Fourteenth

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[82] See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978)(absolute judicial immunity); Imbler v. Pachtman, 424 U.S. 409 (1976)(absolute prosecutorial immunity); Pierson v. Ray, 386 U.S. 547 (1974)(qualified immunity for police officers); Scheuer v. Rhodes, 416 U.S. 232 (1974)(qualified immunity for executives); Wood v. Strickland, 420 U.S. 308 (1975)(qualified immunity for school board members). See generally Nahmod, CIVIL RIGHTS AND LIBERTIES chs. 7,8.

[83] This signaled the Court's later emphasis on avoiding over-deterrence for both absolutely and qualifiedly immune defendants. See generally Nahmod, CIVIL RIGHTS AND CIVIL LIBERTIES chs. 7,8

[84] "Under [the functional] approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure of liability would likely have on the appropriate exercise of those functions." Forrester v. White, 484 U.S. 219, 224 (1988). See Nahmod, CIVIL RIGHTS AND LIBERTIES sec. 7:2.

Amendment. Also, *Tenney* did not have to address the color of law issue because the defendants had clearly acted pursuant to state law. [85]

Section 1983 made its next appearance in the Supreme Court ten years later in *Monroe v. Pape*. By this time, the Court's composition had changed, with five new justices. Chief Justice Warren had replaced Vinson, Justice Harlan had replaced Jackson, Justice Brennan had replaced Minton, Justice Whittaker had replaced Reed and Justice Stewart had replaced Burton.

II. *Monroe v. Pape*

A. *Monroe:* The Political and Social Setting

Monroe arrived at the Supreme Court in 1960, when Dwight Eisenhower, a year from being replaced by John F. Kennedy, was still President. The Soviet Union remained a threat to interests of the United States around the world but the fear of domestic Communist subversion had somewhat receded. Six years had passed since the Supreme Court's monumental 1954 school desegregation decision in *Brown v. Board of Education*, a decision that had captured the attention of the nation, roiled the South and given rise to the Southern resistance to *Brown*.[86] There had already been highly publicized violence as well as marches on Little Rock, Arkansas and on Montgomery and Selma, Alabama. But in the 1960's the pace and intensity of such demonstrations (led by Martin Luther King, Jr. and others), together with

[85] There may have been an Eleventh Amendment/person issue that was not pursued by the parties: Brandhove apparently sued the California State Legislature—effectively the State of California--as well as its members individually. This issue was not resolved by the Court until Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), which held that a state is not a suable person under section 1983, whether sued in federal or state court.

[86] In 1954, the same year *Brown* was handed down, the Communist Control Act set out severe penalties for Communists who failed to register with the government. 50 U.S.C. secs. 841-44. And in 1956, the FBI launched a counter-intelligence program (COINTELPRO) to infiltrate and neutralize the Communist Party and associated left-wing groups. See vault.fbi.gov/cointel-pro (visited on 12-7-12).

the violent Southern responses to them,[87] were to increase markedly and eventually give rise to the creation of an effective political coalition supporting racial equality.[88]

The Supreme Court's decisions in its 1960 Term reflected the diminishing but still present fear of Communist subversion in the United States.[89] However, they were fewer in number than such cases ten years earlier. Furthermore, several controversial 1957 decisions of the Court had limited federal and state legislative investigations, and federal criminal prosecutions, of alleged Communists.[90]

Post-*Brown*, the Court was confronted with Southern resistance in the form of public school closings, the adoption of "freedom of choice" plans and massive community opposition. In this

[87] In 1963 a Ku Klux Klan sympathizer assassinated Medger Evers, a NAACP leader, in Jackson, Mississippi. In that same year, the Ku Klux Klan bombed the Sixteenth Street Baptist Church in Birmingham, Alabama, killing four girls. In 1964, the Ku Klux Klan murdered Michael Schwerner, James Chaney and Andrew Goodman, all civil rights activists, in Philadelphia, Mississippi. See generally Michael J. Klarman, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY ch. 7 (2004)[hereafter, Klarman, FROM JIM CROW TO CIVIL RIGHTS].

[88] Klarman, FROM JIM CROW TO CIVIL RIGHTS 385-442. Also, the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq, contained important provisions that prohibited racial discrimination in any program receiving federal assistance, including most public school systems, and that authorized the U.S. Attorney General to institute school desegregation litigation.

[89] Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961), upholding the application to the Communist Party of the Subversive Activities Control Act of 1950, which required registration; Scales v. United States, 367 U.S. 203 (1961), upholding a conviction for knowing and active membership in the Communist Party under the membership clause of the Smith Act, 18 U.S.C. § 2358 (1958) and Noto v. United States, 367 U.S. 290 (1961), reversing a conviction under the same clause for insufficient evidence; Wilkinson v. United States, 365 U.S. 399 (1961) and Braden v. United States, 365 U.S. 431 (1961), both upholding convictions for refusing to answer questions of a subcommittee of the House Committee on un-American Activities; Deutsch v. United States, 367 U.S. 456 (1961), reversing a contempt conviction because of government failure to prove that the questions asked were relevant to the subject of inquiry by a subcommittee of the House Committee on un-American Activities

[90] Watkins v. United States, 354 U.S. 178 (1957); Sweezy v. New Hampshire, 354 U.S. 234 ((1957); Yates v. United States, 354 U.S. 298 (1957)(adopting narrow interpretation of Smith Act); Mallory v. United States, 354 U.S. 449 (1957); Jencks v. United States, 353 U.S. 657 (1957). See Klarman, FROM JIM CROW TO CIVIL RIGHTS 334.

atmosphere, the Court was silent on school desegregation, although not on segregation generally.[91] It let lower federal courts deal with implementing *Brown* in the first instance, pursuant to the instructions in *Brown II*.[92] The Court intervened only once, in 1958 in *Cooper v. Aaron*,[93] a case that dealt with efforts to integrate the Little Rock public school system. Governor Orval Faubus had ordered the Arkansas National Guard to block black children from entering the school but President Eisenhower sent troops to enforce federal law. All nine justices signed the opinion that affirmed the Court of Appeals' order that school desegregation must continue in the high school. Responding to the Governor's claim that he was not subject to *Brown*, the Court declared: "[T]he federal judiciary is supreme in the exposition of the law of the Constitution" and "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the Supreme Law of the Land."

It was in this post-*Brown* setting that *Monroe* arose in the City of Chicago.

B. *Monroe*: The Petition for Certiorari

In *Monroe*, the plaintiffs, African-American James Monroe and his family (including young children), alleged in their 1959 lawsuit that, in the early morning of October 29, 1958, thirteen Chicago police officers broke into their home, "routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers." They also alleged that the police officers had leveled racial insults. James Monroe was then taken to the police station and detained on "open charges" for ten hours, was interrogated in connection with a murder, was not taken

[91] For example, in a series of per curiam opinions, the Court struck down segregation of public golf courses, public beaches and bathhouses, and buses. Holmes v. City of Atlanta, 350 U.S. 879 (1955); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955); Gayle v. Browder, 352 U.S. 903 (1956).

[92] Brown v. Board of Education, 349 U.S. 294 (1955)(*Brown II*), declaring that district courts in *Brown* were to proceed "with all deliberate speed" to admit the plaintiffs to public schools on a non-discriminatory basis.

[93] Cooper v. Aaron, 358 U.S. 1 (1958).

before a magistrate, was not permitted to call his family or attorney and was subsequently released with no charges brought against him. He claimed that the police officers, who had no search or arrest warrant, violated his Fourth and Fourteenth Amendment rights. Using section 1983, he sued them for damages and also sued the City of Chicago for damages expressly using a respondeat superior theory.[94]The district court dismissed the complaint and the Seventh Circuit, relying on its decision in *Stift v. Lynch*,[95] affirmed on the ground that the alleged misconduct of a city's police officers did not make a "sufficient showing of a violation" of section 1983.

The plaintiffs' twelve-page Petition for Certiorari[96] set out four Questions Presented, of which the first and fourth are most relevant here.[97] The first raised the question whether the plaintiffs' detailed allegations stated a section 1983 cause of action for damages against the police officers.[98] The

[94] The attorneys who represented Monroe from the beginning drafted the Complaint alleging respondeat superior liability, apparently intending to create law on this issue and on the related question of whether a local government is a suable person under section 1983. See *infra* note – on plaintiff's attorneys and text accompanying notes – on the plaintiff's arguments regarding respondeat superior liability.

[95] Stift v. Lynch, 267 F.3d 237 (7th Cir. 1959).

[96] The Petition for Certiorari was prepared by civil liberties attorneys Morris Ernst, from New York, and Charles Liebman, Donald Page Moore, Ernst Liebman and John W. Rogers, all from Chicago. These attorneys also were on the merits briefs in the Supreme Court. Moore argued *Monroe* in the Supreme Court.

The plaintiff was apparently first contacted by Moore, a prominent civil rights attorney in Chicago with the Illinois branch of the American Civil Liberties Union. M. Gilles, Police, Race and Crime in 1950's Chicago 41, 53 in CIVIL RIGHTS STORIES (M. Gilles and R. Goluboff, eds.)(2008)

[97] The second and third dealt with conspiracies:

"2. Whether a complaint alleging the above acts and a conspiracy by respondents to commit them states a cause of action under R.S. sec. 1980.

3. Whether a complaint setting forth the above acts and the above conspiracy plus all other elements of the tort defined by R.S. sec. 1981 states a claim under that section."

[98] "1. Whether petitioners, a husband, wife and their six children, stated a cause of action for damages under the Civil Rights Act, R.S. sec. 1979, when they alleged that thirteen Chicago police officers, acting under color of law, arbitrarily and unreasonably broke into their home and searched it in the night time without a warrant, assaulted and battered them without cause, humiliated them with invidious references to their race, forced two of them

fourth raised this question: "Whether a municipal corporation can be sued under the Civil Rights Act for damages arising from 14th Amendment due process and equal protection violations by its police officers."

The plaintiffs argued that there were four reasons to grant the Petition. First, there was a split in the circuits, specifically between the Seventh Circuit in this case and the Fifth Circuit.[99] Second, there was considerable confusion and conflict in the lower federal courts because the Supreme Court had never dealt with the applicability of section 1983 to police officers. Third, the decisions of the district court and the Seventh Circuit on the Fourteenth Amendment's Due Process Clause in this case conflicted with the Supreme Court's decision in *Wolf v. Colorado*,[100] which held that the "security of one's privacy against arbitrary intrusion by the police … is … implicit in the concept of 'ordered liberty' and as such enforceable against the States through the Due Process Clause." Finally, this was the first search and seizure case ever to come before the Supreme Court where the rights of *innocent* persons were involved.

In their nine-page response, the defendants, represented by the City's Corporation Counsel,[101] made three arguments. First, there was really no conflict in the circuits: the purported legal differences in the circuits were attributable to factual differences. Also, these kinds of cases belonged in state court where redress was available under state law; a federal forum was not appropriate. Otherwise, every

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from their bed naked, arbitrarily arrested and secretly confined one of them for interrogation and exhibition in line-ups and, finally, released them without ever charging any of them with a crime."

[99] Davis v. Turner, 197 F.3d 847 (5th Cir. 1952).

[100] Wolf v. Colorado, 338 U.S. 25 (1949).

[101] John C. Melaniphy was Corporation Counsel and on the opposition brief with Sydney R. Drebin and Harry H. Pollock, each of whom was Assistant Corporation Counsel. Drebin argued *Monroe* in the Supreme Court.

false arrest, search and imprisonment would give rise to a section 1983 claim.[102] Second, the plaintiff did not allege Fourteenth Amendment violations and thus there was no section 1983 cause of action. And third, in the alternative the City of Chicago was protected by governmental immunity, which was not abrogated by section 1983.

The plaintiffs' Reply Brief, which totaled two pages, contended that the defendants had not grappled at all with the split in the circuits. Plaintiffs also maintained that if indeed there was no federal remedy for victims of the "midnight knock on the door," then the Court should grant certiorari and simply say so. They also countered the defendants' argument that the availability of a state court remedy should bar the plaintiffs from pursuing their federal section 1983 remedy in federal court. In plaintiffs' view, section 1983 was specifically intended to provide litigants with their choice of a federal forum as against a state forum.

C. *Monroe*: Certiorari Granted; Merits Briefs

According to the papers of Justice Douglas,[103] every justice, with the exception of Justice Frankfurter, voted to grant certiorari to address the first and fourth of the Questions Presented.[104] Justice Douglas's clerk, Steven B. Duke,[105] noted in his certiorari memo that the plaintiffs were black: they had alleged, as mentioned in the Questions Presented, that invidious racial remarks were directed at them.[106] He recommended granting certiorari not only because there was a circuit split, but also

[102] This very federalism argument was to appear years later in cases such as *Paul v. Davis*, 424 U.S. 693 (1976), that expressly warned against making section 1983 a "font of tort law."

[103] LOC, Douglas Box 1246-No. 39.

[104] As mentioned earlier, these dealt with the section 1983 cause of action (including color of law) and municipal liability issues.

[105] Duke is a professor at Yale Law School. The AALS Directory of Law Teachers, 2011-2012.

because the Seventh Circuit's decision (a "bafflement") had simply ignored section 1983. The local government liability issue, though, was apparently collateral in Duke's view. Duke further commented that he could find no extended discussion in the legislative history of "color of law."[107]

1. *Monroe*: Plaintiffs' Merits Brief

Plaintiffs' merits brief began by arguing, citing *Wolf v. California*,[108] that plaintiffs' Fourteenth Amendment due process rights were violated by the defendants' unreasonable search and seizure. This argument relied both on the Fourth Amendment and on the Due Process Clause. The plaintiffs also contended that the availability of state judicial remedies did not bar their section 1983 damages claim. Section 1983's language did not contain such an exception; section 1983's related jurisdictional provision[109] similarly contained no such exception. Moreover, as a matter of policy the primary purpose of section 1983—enforcement of the Fourteenth Amendment through a damages remedy—would be undermined by an exhaustion of state judicial remedies requirement.

The plaintiffs then maintained that the specific intent requirement that applied to 18 U.S.C. sec. 242, [110] the criminal counterpart of section 1983, should not govern section 1983 claims. Unlike section 242, section 1983 did not contain the requirement that violations be "willful." Moreover, unlike criminal

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[106] Interestingly, the plaintiffs' race and the racial epithets directed against them were not explicitly mentioned in Justice Douglas's opinion for the Court. See discussion *infra* about the significance of this.

[107] This observation anticipated the issue that was later to generate Justice Harlan's concurrence (joined by Justice Stewart) and, more importantly, Justice Frankfurter's lengthy partial dissent in *Monroe*.

[108] Wolf v. California, 338 U.S. 25, 28 (1949), noted earlier in connection with the incorporation, through the Fourteenth Amendment, of the Fourth Amendment's norm protecting privacy against arbitrary police intrusion.

In Mapp v. Ohio, 367 U.S. 643 (1961), coincidentally decided in the same Term as *Monroe*, the Court held that the Fourth Amendment's exclusionary rule was incorporated at well.

[109] 28 U.S.C. 1343(3).

[110] See Screws v. United States, 325 U.S. 91 (1945).

statutes that could be subject to vagueness challenges and thus required specific intent, there would be no such unfairness to section 1983 defendants. Plaintiffs explained: "Tort liability for unreasonable searches and seizures by law officers has existed at least since the 18th Century."[111]

Following their relatively brief discussion of the section 1983 claim, with barely a mention of the color of law issue, plaintiffs focused their attention on the municipal liability issue and devoted forty-three pages to it in the argument portion of their brief.[112] They pointed out that the lower courts did not reach the municipal liability issue because they had dismissed plaintiffs' claims. They argued nevertheless that the Supreme Court should reach the issue. Specifically, plaintiffs contended that respondeat superior liability should govern their section 1983 claims against the City of Chicago. They acknowledged that the relevant question was whether Congress *intended* section 1983 respondeat superior liability. They also admitted that the draftsmen of section 1983 had never discussed respondeat superior. They then moved directly into the analytically distinct issue of sovereign immunity: is a municipality a suable person under section 1983?[113] They argued that the "obsolete doctrine of

[111] Plaintiffs' Brief at 18. The above arguments dealing with the liability of the police officers took up fewer than ten pages, with little attention paid to the color of law issue except in passing.

[112] The municipal liability portion of Plaintiffs' Brief begins at p. 21 and concludes at p. 64. The argument portion as a whole begins at p. 9 and concludes at p. 65.

[113] Analytically, the question whether a local government is a suable person under section 1983 is prior to, and distinct from, the question what the basis of local government liability is, or should be. If the first question is answered in the affirmative, then the basis of liability issue arises. If the first question is answered in the negative, the basis of liability question disappears. This must explain why the plaintiffs spent so much time on whether a local government is a suable person under section 1983. Further, the plaintiffs in *Monroe* had little choice in the matter in their merits brief because they had committed to respondeat superior in their Complaint as a matter of litigation strategy. What this meant as a practical matter, though, was that they were able to offer no theory of municipal liability apart from respondeat superior.

The distinction between the question whether a local government is a suable person under section 1983 and the basis of local government liability was made clear in Monell v. Department of Social Services, 436 U.S. 658 (1978), which held that local governments are suable persons. In *Monell*, the Court rejected respondeat superior and announced the official policy or custom requirement for local government liability. See generally Nahmod, CIVIL RIGHTS AND LIBERTIES LITIGATION ch. 6.

sovereign immunity" should not be engrafted on section 1983. Because section 1983 must be given a liberal construction, it was the City's burden to show why it should be exempt from section 1983 liability. Plaintiffs also observed that in earlier section 1983 equity cases involving, for example, school desegregation, the Court had implicitly held that municipal corporations were indeed suable persons under section 1983.

Plaintiffs then delved into policy. In a wide-ranging argument, they maintained that sovereign immunity in general was not well grounded in history, and that it also was not supported by "reason." In particular, section 1983 municipal liability promoted risk spreading: it was not fair for a plaintiff who had suffered constitutional injury to bear the costs alone. Furthermore, it was not fair to the community as a whole because municipal liability promoted *deterrence* as well as compensation to the individual plaintiff. In support of these policy arguments, the plaintiffs quoted various prominent scholars of the era.[114] In particular, they quoted first, and at length, from an article by Caleb Foote[115] on tort remedies against the police for violations of individual rights.[116] However, the plaintiffs did not directly address the implications for federalism of their position in favor of federal judicial review of state and local government police practices through section 1983 damages actions.

The plaintiffs also made a historical argument based on *Tenney*'s determination that legislative immunity (or privilege) was deeply embedded in history. In their view, municipal immunity, unlike legislative immunity, was not a "well- established, universally recognized American common law rule." At most, it was a "hodge-podge" and thus could not serve as the basis for interpreting section 1983 to

[114] These included Lon Fuller and A. James Casner, both professors at Harvard Law School, and Leon Green, former Dean of Northwester Law School and professor at University of Texas Law School.

[115] Professor at University of Pennsylvania Law School.

[116] Caleb Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493, 514 (1955). Plaintiffs' Brief at pp. 42-44.

preclude municipal liability. Moreover, differing state law rules of municipal immunity should not control the interpretation of section 1983, a federal statute. If they did, federally protected rights would vary from state to state, undermining important interests in equality and uniformity.

Finally, the plaintiffs contended that federal courts would not be "seriously inconvenienced" if municipalities could be held liable under section 1983. There had been only thirty-six reported section 1983 suits filed against police officers since 1939, the year *Hague v. CIO*[117] was handed down. In this connection, plaintiffs discussed the results of questionnaires they had sent to fifty-four of the largest cities in the United States. The responses, they claimed, demonstrated that imposing respondeat superior liability on municipalities would result neither in a flood of litigation nor in substantial financial hardship for cities.

The plaintiffs highlighted the media statement that "even in Chicago 'which probably has the worst [police] department of any sizable city' (Life Magazine, Sept. 16, 1957, p. 71), only 31 suits were filed in 1959, although the Police Department made 'two hundred seven thousand physical arrests…' in 1959."[118] And they similarly highlighted, in the very end of their brief, a lengthy quote from Justice Douglas's book, The Right of the People (1958), including the following:

> People whose homes are searched are the lowly, not the high. It is the unknown person who is tortured by the police. The prominent and the powerful people among us do not suffer then main invasions of privacy that take place. As Justice Black said, "they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless."[119]

[117] Hague v. CIO, 307 U.S. 496 (1939).

[118] Plaintiffs' Brief at 62.

[119] Plaintiffs' Brief at 65. The quote from Justice Douglas's book is at 157. Justice Black's quote appears in Chambers v. Florida, 309 U.S. 227, 238 (1940).

2. *Monroe*: Defendants' Merits Brief

The defendants' merits brief was only twenty-eight pages long but it expressly argued and developed the threshold color of law issue on which Justice Frankfurter, alone, was partially to dissent. Defendants argued that the police officers here did not act under color of law because they had acted in violation of the Illinois Constitution, Illinois law and the ordinances of the City of Chicago.[120] In the course of making this argument, they appeared to contend that a state action finding is dependent on a finding of color of law.[121]

The remaining thirty-three pages of the plaintiffs' merits brief contained four appendices that supplemented the plaintiffs' arguments on the section 1983 cause of action, especially as it related to unreasonable searches and seizures and the privacy of the home, and municipal liability.

Appendix A was entitled: MEMORANDUM ON THE HISTORIC SIGNIFICANCE OF THE INDIVIDUAL'S RIGHT TO PRIVACY IN HIS HOME, FREE FROM UNREASONABLE SEARCHES, WITH PARTICULAR ATTENTION TO: (1) THE CASE OF THE WRITS OF ASSISTANCE; (2) THE CASES OF THE GENERAL WARRANTS; (3) THE CONGRESSIONAL DEBATES ON [SECTION 1983].

Appendix B was entitled: MEMORANDUM ON THE LEGISLATIVE HISTORY OF [SECTION 1983], AS IT RELATES TO THE REASONS FOR FEDERAL JURISDICTION AND THE ACT'S INTENDED SCOPE.

Appendix C was entitled: Constitutional Provisions of 60 Nations Pertaining to Search, Seizure, and the Inviolability of the Home.

Appendix D was entitled: 58 PRE-1871 STATUTES IN 25 STATES INCORPORATING CITIES AND TOWNS AS "BODIES POLITIC AND CORPORATE."

Plaintiffs later submitted a Supplemental Brief that included a brand new Supreme Court of California decision, Muskopf v. Corning Hospital District, 29 U.S.L.W. 2366 (Feb. 14, 1961), that abolished sovereign immunity in California.

[120] In my section 1983 presentations to federal judges and attorneys, I have described this as the "chutzpah" defense.

[121] Defendants' Brief at 14. This was doctrinally incorrect. The color of law issue, which is a matter of *statutory* interpretation, has always been analytically distinct from, and follows, the state action issue—meaning governmental action-- which is a matter of *Fourteenth Amendment*, or constitutional, interpretation. If there is no Fourteenth Amendment violation because there is no state action, then section 1983 is inapplicable by definition. It is only when there is a Fourteenth Amendment violation (because there is state action) that the color of law and related scope of section 1983 issues arise. The question in *Monroe* was whether these acts were under color of law, not whether they were state action.

The defendants next addressed the Court's color of law decisions in *Williams v. United States*[122] and *Screws v. United State*[123] which had relied on *U.S. v. Classic*.[124] These two cases, over dissents by Justices Frankfurter, Robert, Jackson and Minton, had held that conduct violating state law constitutes both state action and color of law. Defendants argued that such conduct was neither state action nor color of law. They claimed: "[Plaintiffs] think that any violation by a police officer of a right guaranteed by the Fourteenth Amendment is tantamount to a deprivation of such right by state action. This is not so."[125] The defendants were arguing here that because their alleged acts were committed by individual police officers in violation of state law, the *State of Illinois* had not deprived the plaintiffs of any Fourteenth Amendment rights. The defendants then expressly urged the Court to adopt the position of the dissenting justices (including Justice Frankfurter) in *Williams* and *Screws*, contrary to the color of law ruling in *Classic*.

Defendants also briefly addressed the plaintiffs' other arguments. First, they claimed that they had never argued that the availability of state tort remedies barred the plaintiffs from obtaining relief under section 1983. Rather, it was their position that plaintiffs' remedy, if any, was solely in state court under state law. Second, they contended that section 1983 should have a "willfulness" requirement just as the criminal statute involved in *Screws* did. This was necessary, they argued, because of a concern with avoiding vagueness even in civil cases. And third, they maintained that the allegations in plaintiffs' complaint regarding custom or usage of the City of Chicago were insufficient as a matter of law.

[122] Williams v. United States, 341 U.S. 97 (1951)

[123] Screws v. United States, 325 U.S. 91 (1945).

[124] United States v. Classic, 313 U.S. 299 (1941).

[125] Defendants' Brief at 18.

Rather remarkably, on the municipal liability issue the defendants were of no assistance whatever either to the Court or to Justice Frankfurter who would successfully lead the attack against such liability in conference. The defendants' primary response to the plaintiffs' lengthy arguments favoring municipal liability under respondeat superior was to rely on the Illinois statute providing for municipal immunity except in cases of willful misconduct.[126] They also suggested that *Williams* and *Screws* had nothing to do with municipal liability. Their only policy argument was to the effect that respondeat superior liability would subject municipalities to strict liability no matter how innocent their conduct or how extensive their attempts to prevent police misconduct. The defendants also characterized as "libel" the derogatory media comment about the Chicago Police Department—that it was probably "the worst [police] department of any sizable city"--that plaintiffs in their merits brief had quoted.

The plaintiffs' short, nine-page, reply to defendants' merits brief picked up on the defendants' apparent confusion regarding the distinction between state action and color of law.[127] Plaintiffs pointed out the defendants' position on state action was argued by them for the first time and had been rejected long ago by the Court in *Ex Parte Virginia*.[128] They also noted that the defendants' color of law argument regarding the alleged acts of the police officers had similarly been rejected by the Court in *Classic*, *Screws* and *Williams*. Moreover, these decisions resolved matters of statutory interpretation

[126] Defendants' Brief at 24-28.

[127] In the last one and one-half pages, the plaintiffs were content to limit themselves to observing simply that the defendants had made no serious policy arguments at all in favor of their positions. Plaintiffs also brought their case citations and responses to their questionnaires up to date.

[128] Ex Parte Virginia, 100 U.S. 339, -- (1880), where the Court stated: "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

that had not been questioned by Congress. If these decisions were repudiated, "a substantial portion of the work of the Civil Rights Division of the Department of Justice will have to be abandoned."[129]

D. *Monroe*: Oral Argument

The oral argument, held on November 8, 1960,[130] is important in telling the story of *Monroe* for several reasons. First, there was a clear disparity in the quality of the arguments: plaintiffs' counsel was considerably more competent and knowledgeable. Second, Justice Frankfurter repeatedly and obviously made known his views on color of law and municipal liability. He also directly engaged, indeed, badgered, plaintiffs' counsel on these issues, even during rebuttal. Third, the majority of the justices who asked questions focused on the *defendants'* oral argument on color of law, not on the plaintiffs', signaling the ultimate outcome in favor of the plaintiffs on this issue.

1. *Monroe*: Plaintiffs' Oral Argument.

Plaintiffs' counsel, Donald Page Moore, began with an extensive elaboration of the facts as alleged, including the allegations that the defendants did not allow the father or the mother to get dressed, that they forced the father to stand naked in the living room surrounded by his family while the apartment was searched, that they uttered various racial epithets, that one of the officers kicked a six-year-old child for no apparent reason, that they took the father out to the police station and kept him for ten hours without taking him to a judge, that they did not allow him to call his family or an attorney and, finally, that they released him without ever filing charges. While counsel was painting this picture, he was not interrupted for at least ten minutes. Eventually, Chief Justice Warren, concerned with the

[129] Plaintiff's Reply Brief at 4.

[130] Each side had almost an hour. The oral argument can be accessed at oyez.org by searching "Monroe v. Pape." I thank Jerry Goldman of Chicago-Kent's Oyez Project for making this oral argument available.

Fourth Amendment issue, asked how the defendants got into the apartment. Counsel responded: through breaking and entering.

The first substantive issue that counsel addressed in oral argument was color of law.[131] According to the plaintiffs, defendants acted under color of law pursuant to *Classic, Screws* and *Williams*. At this point, Justice Frankfurter interjected that *Screws* was a criminal case pursuant to 18 U.S.C. section 242. Counsel responded that Justice Douglas's footnote in *Screws* stated that sections 242 and 1983 were to be interpreted *in para materia* on the color of law issue. Justice Stewart then objected that *Screws* involved perfectly legal behavior by the police, at least under state law.[132] Counsel responded that *Williams*, at least, involved an arrest without probable cause. Moreover, *Screws* should not be overruled: Congress had reaffirmed this definition of color of law, which was a matter of statutory interpretation. Justice Frankfurter, already quite active in this oral argument, asserted that *Williams* did not involve color of law but rather state action, and that the two were separate concepts. Jumping in at that point, perhaps to help counsel, Justice Douglas said that *Williams* did in fact involve color of law.

Justice Frankfurter, signaling to the other justices that the color of law issue was paramount for him because of federalism concerns,[133] then asked about the differences between police officers complying with state law and violating it. Counsel replied that Congress had ratified the *Screws* understanding of color of law. Plaintiffs' counsel then moved on briefly to the Fourth and Fourteenth Amendment issue, citing *Wolf v. Colorado*. He concluded this portion of his oral argument by observing

[131] As noted earlier, the plaintiffs had not given much attention to this issue in their brief on the merits, on the apparent assumption that the issue had previously been resolved by the Court. See discussion *supra*.

[132] Justice Steward joined Justice Harlan's concurring opinion on the color of law issue.

[133] Justice Frankfurter had not yet sent his lengthy memorandum on color of law and municipal liability to fellow justices. He did so the following day. See discussion *infra*.

that section 1983 was a "simple statute" that applied in this case unless *Screws* and *Williams* were repudiated, or unless *Wolf* was repudiated.

At twenty-six minutes into his oral argument, plaintiffs' counsel turned to Chicago's liability for damages under section 1983.[134] Counsel pointed to, among other things, Supreme Court cases involving the liability of states for violating federal statutes, including political subdivisions. Justice Frankfurter then asked whether this was all the plaintiffs had found on municipal liability. Was there any detailed legislative history? What about Congressional rejection of the Sherman Amendment? Counsel replied that this rejection was irrelevant to section 1983 because the Sherman Amendment referred to the victims of mob violence by private individuals and potential municipal liability for such conduct. Justice Frankfurter then emphasized that there were serious arguments against the Sherman Amendment made in Congress, to which counsel responded that the Sherman Amendment was rejected only because it created state action problems under the Fourteenth Amendment.

Justice Frankfurter reacted with incredulity to this response as well as to counsel's reliance on remarks by Representative Shellabarger that section 1983 must be interpreted broadly in a pro-plaintiff manner because of its remedial purposes. Justice Frankfurter began to push counsel very hard on the Sherman Amendment's rejection, to which counsel could only respond, as he had earlier, that Congressional objections to the Sherman Amendment were based on its potential application to municipal liability for the acts of private individuals.[135] Justice Frankfurter then began reading from the Congressional debates themselves, and apparently pounded on the bench for emphasis while doing so.

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[134] As noted earlier, much more space in plaintiffs' merits brief was given over to this issue than to the color of law issue. Also, the plaintiffs' theory of liability was based on respondeat superior, while most of the argument in the plaintiffs' merits brief was devoted to sovereign immunity and whether Chicago was a suable person. See discussion *supra*.

[135] This turned out to be correct, according to Justice Brennan's opinion for the Court in Monell v. Department of Social Services, 436 U.S. 658 (1978). See discussion *infra*.

Counsel's voice kept rising in apparent frustration as he attempted to address Justice Frankfurter's concerns. No justice interrupted, even though this municipal liability debate between Justice Frankfurter and plaintiffs' counsel lasted approximately twelve minutes.[136]

Plaintiffs' counsel completed his argument about municipal liability first by referring to the Dictionary Act that included municipalities as persons and then by citing early section 1983 equity cases that treated cities as persons. If these decisions were correct, then "person" did not have a bifurcated meaning. Counsel specifically pointed out that an early section 1983 federal court decision had ruled that a city was a suable person under section 1983.[137] Next, counsel emphasized the policy considerations supporting municipal liability as well as the virtually unanimous scholarly disapproval of sovereign immunity. Counsel pointed out that it was likely that the plaintiffs would have no remedy unless Chicago could be sued.[138] He then argued more generally that financially responsible defendants were required in order to encourage attorneys to take these kinds of section 1983 damages cases. However, plaintiffs' counsel never addressed the question of respondeat superior liability as such.

Justice Stewart then asked plaintiffs' counsel an apparently innocuous but rather important question just before counsel reserved five minutes for rebuttal: did it make any difference that the plaintiff father was innocent of any crime? Counsel responded that it did: without a section 1983 damages remedy, there was no forum or remedy available to this plaintiff and to others similarly

[136] The other justices may have thought there was no reason to interfere with Justice Frankfurter's aggressive questioning on this issue, particularly since it was counsel's burden to persuade the Court that municipal liability was intended by Congress. This supposition is based on the eventual outcome in *Monroe*—a unanimous decision against municipal liability.

[137] At forty-four minutes in.

[138] As it turned out, the individual defendants were eventually successfully sued by the plaintiffs, with a jury awarding them $13,000 in damages, subsequently reduced to $8,000 by the district court. The defendants did not appeal. M. Gilles, Police, Race and Crime in 1950's Chicago 41, 54 in CIVIL RIGHTS STORIES (M. Gilles and R. Goluboff, eds.)(2008).

situated to challenge such conduct.[139] Counsel used this to interpret the admittedly ambiguous legislative history as including cities as persons. Doing so would encourage municipal employers to comply with constitutional rights.

2. *Monroe*: Defendants' Oral Argument.

Defendants' counsel, Sydney R. Drebin, Assistant Corporation Counsel, began his oral argument with a somewhat confused statement about the constitutionality of section 1983. He then added to the confusion by conflating the Fourteenth Amendment and section 1983. However, he quickly recovered and made one of his major arguments, namely, that the Fourteenth Amendment did not alter federalism. Accordingly, he contended, section 1983's color of law requirement should be interpreted narrowly. He then quoted Justice Frankfurter in *Williams* to that effect. However, when he attempted to quote Justice Frankfurter in *Screws* about the "willfulness" requirement of 28 U.S.C. section 242, Justice Frankfurter observed that he had never said anything about that issue. Counsel then said that it was Justice Douglas who had discussed this requirement, to which Justice Douglas responded by noting wryly that he "had had some help in that case."

Perhaps still confused about the willfulness requirement of section 242 and its relation to section 1983, counsel again said that section 1983 was unconstitutional. First, it unlawfully delegated rights and second, it was vague and indefinite. He then returned to color of law and argued that the police officers were merely private trespassers who could not be sued under section 1983 individually; otherwise, every illegal discriminatory act by a police officer would be *state action* and render that police officer amenable to suit under section 1983. Justice Black then asked whether the defendants had the power to arrest without a warrant, to which counsel answered no: there was no reasonable belief

[139] This is reminiscent of what Justice Harlan would say later in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971): for such plaintiffs, "it is damages or nothing."

that a crime had been committed. Chief Justice Warren objected that a murder had been committed, so there was possibly probable cause to arrest the plaintiff father. Counsel responded that this was not in the record.

Several justices then began to press defendants' counsel on his color of law argument. Justice Whittaker wondered what color of law meant if it was to be limited to actions taken pursuant to state law. Counsel responded that it referred to custom and usage. Counsel asserted that section 1983 was directed at the South[140] and that it was only lately that lawyers in the North had begun to argue that it applied in the rest of the country. Justice Harlan asked whether section 1983 was limited to racial issues; counsel admitted that it went beyond that. He then argued, returning to an argument in defendants' brief, that section 1983 was only implicated when the *state*, not individuals, acted unconstitutionally under the Fourteenth Amendment. Justice Whittaker suggested that what counsel meant was that police officers, in order to be liable, must act within the course or scope of their employment. But if that were the case, why "color of law" rather than "in obedience to state law"? Justice Douglas interjected that counsel apparently believed that *Williams* was wrongly decided. Justice Whittaker asked: Why can't Congress create a private cause of action against police officers? Counsel answered that the Fourteenth Amendment referred to *states* explicitly; a *state* must have acted illegally. Chief Justice Warren asked: Is *city* action also *state* action? Counsel answered yes, there was no real distinction.

Approximately thirty minutes into his oral argument, defendants' counsel finally reached the municipal liability issue. But he focused on Illinois law rather than federal law, and got into a rather technical discussion of an Illinois case dealing with municipal liability. Justice Whittaker wondered what this had to do with section 1983, since the Illinois case apparently did not address governmental

[140] The Southern resistance to *Brown,* well under way by this time, was receiving increasing national attention. See discussion *supra*.

immunity. Counsel had undercut his own argument about respondeat superior liability—as Justice Whittaker himself told counsel--since under Illinois statutory law, respondeat superior liability was available against a city.

Justice Douglas returned to the color of law issue, asking whether it meant something different up North than down South. Counsel said no, but added that section 1983 was directed at protecting the Southern Negro and therefore should not apply to Northern states. Justice Frankfurter asked whether section 1983 applied up North and again counsel conceded that it did. Justice Frankfurter then followed-up with a question about the hypothetical applicability of section 1983 to a case in which Illinois had authorized the acts alleged in this case. Counsel responded that in that situation there would be color of law and section 1983 would be applicable.

3. *Monroe*: Plaintiffs' Rebuttal.

Plaintiffs' counsel began his rebuttal by acknowledging that the color of law and municipal liability issues raised federalism concerns. However, he maintained that federalism would not be undermined by plaintiffs' position on color of law; to the contrary, plaintiffs' position would support the States' law enforcement policies. Moreover, to rule in favor of plaintiffs on these two issues would not constitute judicial activism in the sense of policymaking or legislating.[141] To the contrary: to rule in plaintiffs' favor, especially on the color of law issue, would constitute judicial restraint because it was consistent with Congressional intent regarding the meaning of color of law. Furthermore, ruling in plaintiffs' favor on municipal liability and respondeat superior would be an appropriate exercise of judicial power to engage in "interstitial legislation" regarding the meaning of section 1983, even though Congress had not really spoken about this.

[141] Clearly, counsel was responding to the concerns of Justice Frankfurter.

Finally, in a comment that truly provoked Justice Frankfurter, counsel argued that section 1983 was for everyone, not just Negroes, and it was a "righteous law." Justice Frankfurter, unable to restrain himself, objected that counsel was making the color of law issue much easier than it really was. At this point, counsel's time had expired but Chief Justice Warren allowed counsel to continue to address color of law with Justice Frankfurter. Both counsel and Justice Frankfurter vigorously went back and forth on the color of law issue for several minutes, and occasionally spoke over one another. Justice Frankfurter charged that plaintiffs had not really set out any supportive legislative history on color of law, to which counsel responded that no state could have authorized the Ku Klux Klan's acts in the South. And so it went, with voices raised, until the very end--when counsel frankly said to Justice Frankfurter, "Your Honor, with all respect, I believe that [your view] is not an accurate characterization of the legislative history of [section 1983]…. I hate to disagree with Your Honor."

E. *Monroe*: Justice Frankfurter's Memorandum and the Conference of the Justices

On November 9, 1960, the day after oral argument, Justice Frankfurter circulated "a full-dress memorandum"[142] to the justices that he described as "a product of months of work, interchange of ideas, discussion and reflection, by my law clerk, Anthony Amsterdam, and myself."[143] This lengthy Memo expressed disappointment at the lack of guidance from counsel "on this important federalism case." Justice Frankfurter obviously knew the Court's decisions in *Classic, Screws* and *Williams* and, as a result, understood that he faced an uphill battle on color of law. His Memo therefore extensively

[142] This memorandum ("Memo") can be found in the Felix Frankfurter Papers, 1900-1965, Series I, Case Files of Opinions and Memoranda, Boxes 143-1 to 144-16 (Monroe v. Pape), Harvard Law School Library, Call No. Hollis 601625 (available on microfilm)[hereafter Felix Frankfurter Papers]. This Memo can also be found in Justice Brennan's files at the Library of Congress. Justice Brennan papers, LOC, Box I: 50-No. 39.

[143] Anthony G. Amsterdam is a professor at New York University Law School. The AALS Directory of Law Teachers, 2011-2012.

discussed the color of law issue in its first forty-five pages.[144] He also asserted that the parties had essentially ignored the relevant legislative history on municipal liability. This legislative history, which included Congressional rejection of the Sherman Amendment, demonstrated conclusively that Congress did not intend to subject municipalities to section 1983 damages liability.[145]

At the justices' conference on November 11, the responses of the various justices to the briefs, to oral argument and, for those who had read it, to Justice Frankfurter's earlier Memo, were described in Justice Frankfurter's Notes of November 14.[146] Chief Justice Warren, who had not read the Memo, disagreed with Justice Frankfurter's color of law position and was "inclined" to hold the City of Chicago liable, "but was not sure."Justice Black indicated that if the color of law issue were a matter of first impression, he would have agreed with Justice Frankfurter. The Court, though, had several times held to the contrary already, and stare decisis should apply. On municipal liability, Justice Black interpreted section 1983 the same way that Justice Frankfurter had. Justice Frankfurter rested on his circulated Memo. Justice Douglas agreed with Justice Frankfurter on the municipal liability issue but maintained that under *Screws* it was clear that color of law was present. In addition, Congress had not questioned *Screws* in the debates on the Civil Rights Acts of 1957 and 1960. Justice Clark also thought that *Screws* governed, but agreed that municipalities could not be sued under section 1983.

[144] Much of this discussion was later to be used in his partial dissent. See discussion *infra*. The Memo also addressed the municipal liability issue beginning at page 46.

[145] This position was subsequently adopted by Justice Douglas for the Court in *Monroe*. See discussion *infra*.

[146] Justice Frankfurter's memorandum of views expressed at Conference on Friday, November 11, 1960 (dated November 14, 1960)("Notes"). See Felix Frankfurter Papers. I want to thank David Achtenberg for calling these Notes to my attention before I consulted the Felix Frankfurter Papers myself.

Justice Harlan said that he would pass—"something he doesn't like to do"—in order to make an "independent study" of the color of law issue raised in Justice Frankfurter's Memo.[147] Justice Brennan, who had been appointed to the Court in 1956, thought that color of law covered the police officers here.[148] He "lean[ed]" against holding municipalities liable under section 1983. According to Justice Frankfurter's notes, Justice Brennan then "wondered" if section 5 of the Fourteenth Amendment gave Congress the power to abrogate a state's Eleventh Amendment immunity.[149] Justice Frankfurter reported that there was some discussion of this issue, and that he and Justice Black agreed that section 5 "did not repeal pro tanto the Eleventh Amendment of the Constitution."

Justice Whittaker thought that the alleged acts of the police officers were under color of law because "whatever a policeman does, he does under a claim of legal right to do so." Then, in a comment that upset Justice Frankfurter, Justice Whittaker said that this was a "run-of-the-mill case" and it should be treated as such. Justice Frankfurter wrote that he was "so shocked at this remark … that I responded that the whole point of this case is that it is not the run-of-the-mill case in view of the consequences that will flow from our decision…." Finally, Justice Stewart observed the color of law issue had previously been decided by the Court, but he was not clear about municipal liability.

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[147] Justice Harlan would write an extensive concurring opinion, joined by Justice Stewart, on the color of law issue. See discussion *infra*.

[148] Justice Brennan was on his way to becoming a leader of the liberal bloc in the Court, thus deeply disappointing Justice Frankfurter. Indeed, this did not take very long. One year after *Monroe*, Justice Brennan would write the majority opinion in the seminal reapportionment case, Baker v. Carr, 369 U.S. 186 (1962), holding that state malapportionment of legislative districts was not a political question under the equal protection clause. Justice Frankfurter, joined by Justice Harlan, dissented vigorously. And, in 1978 Justice Brennan would write the opinion for the Court in Monell v. Dept. of Social Services, 436 U.S. 658 (1978), overruling the municipal liability holding in *Monroe* and rejecting its historical understanding. See generally Seth Stern and Stephen Wermiel, JUSTICE BRENNAN: LIBERAL CHAMPION 137-38, 150-54 (2010)

[149] The Court would answer this question in the affirmative fifteen years later in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Finally, not giving up even though everyone had spoken and the case had effectively been decided in favor of the plaintiffs on the section 1983 cause of action/color of law issue, Justice Frankfurter could not resist making "a remark or two" about stare decisis and color of law. He argued that the case involved "important aspects of state-federal relations" and thus did not raise an ordinary matter of statutory interpretation subject to the usual rules of stare decisis.[150]

Justice Frankfurter's pre-conference Memo was obviously a preemptive strike, intended to sway the justices on the color of law issue in particular by encouraging them to revisit the holdings in *Classic*, *Screws* and *Williams*. Nevertheless, as Justice Frankfurter's Notes indicate, not a single justice was persuaded by the Memo's color of law argument. However, all agreed, or were inclined to agree, that municipalities could not be sued for damages under section 1983 under any theory of liability, thus resolving the respondeat superior liability issue. No justice, not even Justice Douglas, attempted to rebut the Memo's historical argument against municipal liability. The other justices apparently considered the threshold section 1983 cause of action issue to be considerably more important than the municipal liability issue. They and their clerks also may not have had the time or energy to seriously address the Memo's historical discussion of municipal liability, especially after expending time and energy on Justice Frankfurter's color of law argument. Further, even the plaintiffs' briefs did not really provide much historical support for the contrary position on municipal liability.[151]

There is yet another possible explanation, an intriguing one, for the unanimous municipal liability ruling. In 1960, when *Monroe* was briefed and argued, and in 1961, when it was decided, the Court was surely sensitive to the implementation of *Brown* in the courts and in the South generally,

[150] At the end of his Notes, Justice Frankfurter wrote that he had departed from his usual practice in taking them. Even though he did not put the other justices' remarks in quotes, he believed that the Notes were a "scrupulous transcript of what was actually said."

[151] Still, plaintiffs' counsel at oral argument did say several times that the Sherman Amendment was rejected because of state action concerns.

especially given the Southern resistance to *Brown*. Perhaps the justices, if they thought about this at all,[152] were worried about the real world implications of imposing section 1983 damages liability on school districts for engaging in unconstitutional school desegregation at such an unsettled and volatile time.[153] Indeed, it was only in 1978, well after *de jure* school segregation in the South was dismantled and the specter of school district damages liability for school segregation had largely disappeared, that the Court overruled the municipal liability ruling in *Monroe*.[154]

F. *Monroe*: The Opinions

1. *Monroe*: Justice Douglas's Opinion for the Court

Chief Justice Warren assigned Justice Douglas the task of writing the majority opinion for the Court. Its structure and reasoning must be understood in the context of Justice Frankfurter's lengthy November 9 Memo on color of law and municipal liability. In a very real sense, Justice Douglas had to write the first draft of his opinion as a response to a partially dissenting opinion that had already been circulated. This explains why Justice Douglas paid attention to the color of law issue in *Monroe*, even though *Classic*, *Screws* and *Williams* had seemingly put that issue to rest. Justice Harlan also was sensitive to Justice Frankfurter's Memo. After circulation of an early draft of Justice Douglas's opinion, Justice Harlan wrote Justice Douglas on January 3, 1961,[155] that the case bothered him "a lot" but that, unless Justice Frankfurter's opinion convinced him to the contrary, he would concur and write a "little concurring piece" of his own, which he in fact did on the color of law issue.

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[152] I found no specific mention of this in the papers of the justices I have looked at.

[153] The remedy specifically sought in *Brown* and its progeny was the elimination of school segregation through judicially ordered prospective relief, and not damages. Moreover, proving and recovering any compensable damages would have been difficult, if not impossible, in the South.

[154] Monell v. Department of Social Services, 436 U.S. 658 (1978).

[155] LOC, Douglas Box 1246-No. 39.

Justice Douglas's opinion began by rephrasing the allegations in plaintiffs' complaint, but without referring to the racial insults. This omission might have been intended to emphasize that section 1983 had national application going well beyond Southern racial discrimination cases.[156] Justice Douglas noted that the plaintiffs satisfactorily alleged violations of the Fourth Amendment's prohibition against unreasonable searches and seizures as made applicable to the states by the Fourteenth Amendment.[157] He then went on to address the legislative history of section 1983 in connection with the first major issue in the case, color of law. Up to this point, his discussion was general. He observed that section 1983 was intended not only to override certain state laws and to provide a remedy where state laws were inadequate, but also to provide a remedy where state law remedies were unavailable in practice, even in not in theory.

Justice Douglas referred to the depredations committed by the Ku Klux Klan and the unwillingness of state officials to enforce state laws against the Klan. It was significant that both proponents and opponents of section 1983 had emphasized its breadth, which led Justice Douglas to this conclusion:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[158]

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[156] In this connection, recall the questions directed at defendants' counsel in oral argument that addressed the applicability of section 1983 to the North. See discussion *supra*.

[157] Making Fourth Amendment violations actionable for damages under section 1983 significantly broadened the scope of section 1983 liability and led to increasing numbers of such claims based on illegal searches, seizures, arrests and uses of force. See generally Nahmod, CIVIL RIGHTS AND LIBERTIES secs. 3:17-3:23 (collecting cases).

[158] Monroe v. Pape, 365 U.S. 167, 180 (1961).

Because section 1983 was "cast in general language," it did not apply exclusively to the South, but was applicable to all the states, including Illinois.[159] Further, there was no exhaustion of state judicial remedies requirement: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked."[160]

Reaching the color of law issue, Justice Douglas discussed the relevant precedents, including *Classic*, in which the Court had stated that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.'" Justice Douglas noted that three justices, including Justice Frankfurter, had joined in this opinion by Justice (later Chief Justice) Stone. Also, no one had disagreed with this statement. In addition, *Screws* had later revisited this issue explicitly and, over dissents, the Court had rejected the same arguments about color of law that it was rejecting here. *Classic* was not a hastily reached decision, it was not inconsistent with precedent and it decided an issue of statutory interpretation that Congress could have changed but did not. Not only that: Congress had never even criticized this interpretation of color of law. Had the consequences for federalism been as adverse as was argued by Justice Frankfurter, Congress surely would have objected. "We conclude that the meaning given 'under color of' law in the *Classic* case and in the *Screws* and *Williams* cases was the correct one; and we adhere to it."[161]

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[159] Again, note Justice Douglas's omission of the defendants' race and the racial insults allegedly directed against them.

[160] Monroe v. Pape, 365 U.S. at 183. In other words, a potential plaintiff need not, as a condition precedent to filing a section 1983 claim in federal court, first file a state law claim in state court. Subsequently, the Court held in Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982)(en banc), that exhaustion of *administrative* remedies was also not a condition precedent to filing a section 1983 claim. See Nahmod, CIVIL RIGHTS AND LIBERTIES secs. 9:60-9:65.

[161] Monroe v. Pape, 365 U.S. at 187.

Justice Douglas dispatched the two remaining issues quickly. First, because the word "willfully" did not appear in section 1983, in contrast to 18 U.S.C. § 242, there was no specific intent requirement for section 1983 liability. Rather, section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

And second, with relatively little discussion of the matter—and no analysis whatever of the extensive policy arguments made by the plaintiffs in their merits brief--Justice Douglas concluded for the Court that the City of Chicago was not a suable person under section 1983.[162] Justice Douglas reasoned that section 1983's legislative history, especially the "antagonistic" response of Congress when it rejected the Sherman Amendment, indicated that municipalities were not intended to be subject to section 1983 liability. Clearly, Justice Frankfurter's memo had carried the day on municipal liability, even if it was unsuccessful on the color of law issue.

2. *Monroe*: Justice Harlan's Concurring Opinion

Justice Harlan, like Justice Frankfurter, believed in judicial restraint and federalism and was quite sensitive to stare decisis and sound statutory interpretation.[163] As mentioned earlier, Justice Harlan had informed Justice Douglas that he was likely to write a "little concurring piece" of his own on the color of law issue. Indeed, joined by Justice Stewart, he ended up doing so in *Monroe*. His concurring opinion, far from being "little," was fairly substantial and responded in some detail to Justice Frankfurter's statutory interpretation and policy arguments. Though Justice Harlan did not indicate definitive agreement with

[162] "We do not stop to explore the whole range of questions tendered to us on this issue at oral argument and in the briefs. For we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of section 1979." Monroe v. Pape, 365 U.S. at 187.

[163] See, e.g., Justice Harlan's joining Justice Frankfurter's vigorous dissent in Baker v. Carr, 369 U.S. 186 (1962), a seminal reapportionment decision.

Justice Frankfurter's partial dissent on the color of law issue, he acknowledged that if the color of law issue were one of first impression, it would have been "very close indeed."

Nevertheless, Justice Harlan emphasized that the Court's rulings in *Classic* and *Screws* on the substantially identical color of law language of section 242 led him to conclude that the plaintiffs should prevail here as well. He pointed to the inconclusiveness of section 1983's legislative history on this issue. Furthermore, it was not clear that Justice Frankfurter's color of law interpretation would further the purposes of the 42nd Congress better than the *Classic* and *Screws* interpretation. Specifically, Justice Harlan did not find convincing evidence that the 42nd Congress considered state remedies to be "more adequate for unauthorized actions than for authorized ones" or that there was "greater harm from unconstitutional actions" that were authorized than from those that were unauthorized. "I find less than compelling the evidence that either distinction was important to that Congress."[164] Finally, the view that deprivations of constitutional rights were more serious than violations of state rights was both common sense and "more consistent with the legislative history." In short, "the legislative history does not bear the burden which stare decisis casts upon it."[165]

3. *Monroe*: Justice Frankfurter's Partial Dissent

Justice Frankfurter, of course, partially dissented at length on the color of law issue.[166] In his view, stare decisis did not control here because of the circumstances in which *Classic* and *Screws* were decided. Emphasizing the deep federalism issues implicated in *Monroe*'s color of law issue, he proceeded to reprise much of what was in his November 9 Memo to his colleagues about the legislative

[164] Monroe v. Pape, 365 U.S. at 194.

[165] Monroe v. Pape, 365 U.S. at 202.

[166] Monroe v. Pape, 365 U.S. at 202. However, he agreed with the Court that specific intent was not required under section 1983 and that the Due Process Clause prohibited the kind of police invasion alleged in this case.

history of color of law. He characterized *Classic* as a case in which the Court was unaware that it had departed from decades of precedent with its color of law interpretation of section 242. He explained his joining in the opinion in *Classic* in a defensive and somewhat embarrassed parenthetical aside: "(I joined in this opinion without having made an independent examination of the legislative history of the relevant legislation or of the authorities drawn upon for the *Classic* construction. Acquiescence so founded does not preclude the responsible recognition of error disclosed by subsequent study.)"[167] He observed that four years later in *Screws*, four of six justices simply cited *Classic* and stare decisis uncritically in support of their position that section 242 applied to a state sheriff who had beaten a black prisoner to death. Also, the briefs in *Screws* did not really address the relevant legislative history. Thus, for Justice Frankfurter, the Court had never really given adequate consideration to the legislative history of color of law. *Monroe* was the case in which to do it, and this time properly. Stare decisis did not preclude such an inquiry.

Justice Frankfurter then delved deeply into the legislative history of color of law in sections 1983 and 242 and concluded that color of law covered only state-authorized acts, not unauthorized ones. Thus, the scope of section 1983 was narrower than the scope of the Fourteenth Amendment. Federalism was the driving consideration for Justice Frankfurter:

> The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.[168]

[167] Monroe v. Pape, 365 U.S. at 242 (parentheses in original).

[168] Monroe v. Pape, 365 U.S. at 237 (footnote omitted). The case that Justice Frankfurter cited for this proposition was Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922), which stated: "The Fourteenth Amendment, itself a historical product, did not destroy history for the States."

Along these lines, he expressed concern that the Court's interpretation of section 1983 would allow federal intervention into "the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country."[169]

4. The *Monroe* Template: Issues Resolved and Subsequently Revisited

In its color of law ruling, *Monroe* definitively determined that section 1983's scope was as broad as the scope of the Fourteenth Amendment. Once there was state action, there was color of law as well. Also, the post-*Monroe* incorporation of additional provisions of the Bill of Rights through the Fourteenth Amendment was to expand the scope of section 1983 even further.[170] Furthermore, the rulings that section 1983 has neither a specific intent requirement nor an exhaustion of judicial remedies requirement, are still good law.

In contrast, the Court's ruling that municipalities were not suable persons under section 1983 was overruled in 1978 in *Monell v. Department of Social Services.*[171] The effect of Justice Frankfurter's November 9 Memo on this particular issue therefore lasted seventeen years. But Justice Frankfurter's impact on municipal liability may have lasted longer than that. It has been persuasively argued that Justice Frankfurter's position on color of law influenced Justice Powell, and thus determined the outcome in *Monell*, by leading him to rejecting the argument that respondeat superior liability could

[169] Monroe v. Pape, 365 U.S. at 242. Justice Frankfurter also took seriously and responded to Justice Harlan's concurring opinion, 365 U.S. at 247.

[170] See note 4, *supra*.

[171] Monell v. Department of Social Services, 436 U.S. 658 (1978). As noted previously, *Monell* was written by Justice Brennan who, ironically, had "most enthusiastically" joined the ruling in *Monroe*. Justice Douglas papers, LOC, Box 1246

serve as the basis of municipal liability.[172] Instead, as *Monell* held, the challenged unconstitutional conduct must have been engaged in pursuant to an official policy or custom of the municipality.[173]

Moreover, even though Justice Frankfurter's position on color of law and section 1983 was in fact rejected by all of the other justices in *Monroe,* his view of the importance of federalism continues to be influential to this day both in the section 1983 setting and more generally. As mentioned earlier, Justice Frankfurter maintained that the Civil War and the Reconstruction Amendments did not really change the structure of federalism, except perhaps in the area of racial discrimination.[174] In the section 1983 setting, this view of federalism is reflected in judicial concerns with making section 1983 a font of tort law,[175] with limiting the scope of individual liability because of over-deterrence[176] and with limiting municipal failure to train liability.[177] Similarly, in the last twenty years the Court's moves to limit the scope of Congressional power under both the Commerce Clause and section 5 of the Fourteenth Amendment constitute even more explicit examples of "our federalism."[178]

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[172] This argument is made in David Jacks Achtenberg, Frankfurter's Champion: Justice Powell, *Monell*, and the Meaning of "Color of Law", 80 Fordham L. Rev. 681 (2011).

[173] See Nahmod, CIVIL RIGHTS AND LIBERTIES ch. 6.

[174] See discussion *supra*.

[175] E.g., Paul v. Davis, 424 U.S. 693 (1976), holding that reputation interests, standing alone, are not liberty interests for due process purposes.

[176] E.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982), eliminating the subjective part of the qualified immunity test, restating the objective part and emphasizing that qualified immunity is to be decided as early as possible in the proceedings, preferably before any discovery. See Nahmod, CIVIL RIGHTS AND LIBERTIES secs. 8:3-8:5.

[177] E.g., Connick v. Thompson, 131 S. Ct. 1350 (2011)

[178] E.g., New York v. United States, 505 U.S. 144 (1992)(commerce clause and commandeering state legislatures); Printz v. United States, 521 U.S. 898 (1997)(commerce clause and commandeering state and local executives); United States v. Lopez, 514 U.S. 549 (1995)(limiting commerce clause power to commercial activities); United States v. Morrison, 529 U.S. 598 (2000)(same); National Federation of Independent Business v. Sebelius, -- S. Ct. – (2012)(limiting scope of commerce power to affirmative commercial activities), City of Boerne v. Flores, 521 U.S.

Conclusion

Tenney, a 1951 decision, and *Monroe*, a 1961 decision, established the doctrinal foundations of section 1983. *Tenney* set out the dominant approach to immunity doctrine while *Monroe* broadly articulated the elements of the section 1983 claim. But these two decisions must be viewed in their political and social contexts. They must also be understood as the results of the arguments of the parties as well as of the vastly different views of individual rights and federalism held by Justices Frankfurter and Douglas, two major players.[179] Justice Frankfurter in particular played a significant role in the outcomes in both cases.

Tenney arose during the Cold War in a period of national anti-Communism sentiment and fear of subversion; this period was reflected in the Court's Communism-related case law as well. *Tenney* directly raised the clash between individual rights and federalism by calling into question, through the possibility of damages actions against state and local legislators, government's ability to investigate suspected Communist subversion.[180] Justice Frankfurter's opinion for the Court emphasized the federalism concerns implicated in *Tenney*, and the Court accordingly ruled that state legislators were absolutely immune from damages liability for their legislative conduct, no matter how improperly motivated that conduct was.

In contrast, Justice Douglas, the staunch supporter of individual rights in general and the First Amendment in particular, focused on the individual rights asserted by an admitted Communist, and

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507 (1997)(limiting scope of section 5 power); Board of Trustees v. Garrett, 531 U.S. 356 (2001)(limiting scope of section 5 power because of Eleventh Amendment).

[179] Of course, in *Tenney*, Justice Frankfurter had seven other justices with him; in *Monroe*, Justice Douglas also had seven.

[180] As mentioned earlier, the Court was also clearly concerned with hampering Congressional investigations into suspected Communist subversion. See discussion *supra*.

entirely discounted the federalism concerns implicated in *Tenney*. Justice Douglas stood alone, relatively ineffective; even Justice Black could not go along with his dissent.

Ten years later, in 1961, the perceived threat of Communist subversion, while still present, had diminished considerably at the national level. This, too, was reflected in the Court's jurisprudence at the time, with a smaller number of Communist party cases on its docket. But, in 1961, the country and the Court were struggling with racism and with implementing *Brown* in the face of Southern resistance. Even though the Court was silent about school desegregation in the years shortly after *Brown*, including the year *Monroe* was decided, it was clearly aware of what was going on nationally with regard to the developing civil rights movement.

In one sense, *Monroe* was a case involving racially discriminatory treatment of Monroe and his family. But in a deeper sense, *Monroe* was about the expansion of the Fourteenth Amendment and section 1983 to cover *everyone* whose constitutional rights were violated by state and local government officials, regardless of race. It was no accident that the question of whether section 1983 applied to the North was raised several times during oral argument. Also, it was not surprising that, after *Brown*, which mandated federal judicial intervention in public education at the expense of federalism, the Court would have relatively little difficulty in holding that section 1983 applied to Fourteenth Amendment violations committed by state and local government officials in violation of state law. It was appropriate that Justice Douglas be the author of this opinion for the Court, given his championing of individual rights and his lack of concern for federalism interests generally.

Justice Frankfurter, always a judicial advocate of federalism even in the face of individual rights (as in *Tenney*), was the only justice in *Monroe* who spoke out forcefully about the federalism interests involved in the color of law issue. He lost that battle in *Monroe*; like Justice Douglas in *Tenney*, Justice Frankfurter stood alone and was ineffective on this particular issue. However, he did win on a related

federalism issue for seventeen years: whether local governments could be sued for damages under section 1983.

It was through this complex interplay of the political and social settings of *Tenney* and *Monroe*, the arguments of the parties and the views of Justice Frankfurter and Justice Douglas on individual rights and federalism, that section 1983 was born in the Supreme Court.